Vanishing Points of the Refugee Law Regime

Response to James Hathaway

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I. INTRODUCTION

A deeply felt concern for the importance of refugee law, matched with an equally ardent desire to secure its authority by exploring ways and means that may keep it viable despite contemporary political and economic realities that conspire to undermine it, constitutes the leitmotive in much of the work of Professor James Hathaway.[1] His contribution to the symposium is no exception, for it analyzes the source of perceived conceptual incoherences which, if vanished, would contribute to safeguarding and renewing of the capacity and preparedness of states to grant asylum to those who cannot safely remain in states where they face the risk of being persecuted.[2]

Hathaway's contribution focuses on the right of states to repatriate former refugees and identifies the rules that govern the lawful exercise of this right. Hathaway attributes the lack of a clear understanding of this right and the applicable rules to acts and omissions on the part of the United Nations High Commissioner for Refugees (UNHCR). To date, UNHCR has not addressed the possibility and lawfulness of repatriation of former refugees and it did not even do so when it elaborated the criteria that, if met, would justify the cessation of refugee status by virtue of the cessation clauses pertaining to changed circumstances in the country of origin.[3] Hathaway considers the omission of UNHCR to link the loss of refugee status by virtue of those cessation clauses to the possibility of repatriation of the former refugee as "the source of tremendous conceptual incoherence in

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[1] *See, e.g.*, RECONCEIVING INTERNATIONAL REFUGEE LAW (James C. Hathaway ed., 1997), Marjoleine Zieck, Book Review, 5 INT'L J. ON MINORITY AND GROUP RTS. 433, 433–39 (1998).

[2] James C. Hathaway, *The Right of States to Repatriate Former Refugees*, 20 OHIO ST. J. DISP. RESOL. 175, 215–16 (2005).

[3] *See* UNHCR, *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention Relating to the Status of Refugees (the Ceased Circumstances Clauses)*, U.N. GAOR, 58th Sess., U.N. Doc. HCR/GIP/03/03 (2003) [hereinafter UNHCR, *Guidelines*].

the refugee regime."[4] This omission is considered particularly striking when held against UNHCR's emphatic norm-creating role with respect to voluntary repatriation, *i.e.*, the standards it sets with respect to voluntary repatriation and the corresponding leading role the agency not just assumes, but requires. When implementing this solution in practice, this role eclipses any other alternative, in particular the possibility of repatriating former refugees.[5]

This response shall focus first on the subject UNHCR omitted to address—the possibility of repatriation of former refugees and the norms that govern this form of return. The assumption that the right of states to repatriate former refugees may contribute to regenerating the asylum capacity of states will be questioned. Second, it will discuss the concerns that Hathaway addressed under the heading of "institutional overreaching," as exemplified by UNHCR's promotion of "its own" standards pertaining to voluntary repatriation and cessation of refugee status. This practice of UNHCR will be demonstrated to have a firm basis in international refugee law, yet one which is itself prone to constituting a legal vanishing point. States are portrayed by Hathaway as not only being largely in the dark with respect to their legal entitlements regarding the return of former refugees, but in addition as being put on the wrong foot by UNHCR's exercise of its Statutory tasks such that the agency contributes to the concealing of the authentic scope of the 1951 Convention relating to the Status of Refugees (hereinafter "1951 Convention") and sidelining the obligations it contains. Rather than to UNHCR, this source of legal obfuscation should be attributed to the peculiar systemic features of the refugee law regime itself,[6] features that are reflected and confirmed by states, notably those with a demonstrated interest in and devotion to the solution of the refugee problem, in the conclusions they adopt in the framework of the Executive Committee of

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[4] Hathaway, *supra* note 2, at 183.

[5] On the requirement, see UNHCR, *Handbook: Voluntary Repatriation: International Protection*, U.N. GAOR, 51st Sess., at 13 (1996).

[6] The reference to "refugee law regime" should in the present context predominantly be taken to refer to the Statute of the Office of UNHCR, G.A. Res. 428 (V), U.N. GAOR, 5th Sess., 325th mtg., U.N. Doc. A/Res/428 (1950) [hereinafter Statute of UNHCR], the 1951 Convention relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) (as of Aug. 11, 2004, 142 states parties) [hereinafter 1951 Convention], and the 1967 Protocol relating to the Status of Refugees, *opened for signature* January 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) (as of Aug. 11, 2004, 142 states parties) [hereinafter 1967 Protocol].

UNHCR. In short, the very real and serious negative protection consequences alleged to follow from UNHCR's institutional overreaching will be argued to have an altogether different cause.

II. BEYOND THE REFUGEE LAW REGIME

A. *The Limits of Special Regimes*

Refugee law is a special and, in principle, temporarily applicable body of international law that trumps the national laws that otherwise govern the entry, stay, and departure of aliens with a view to secure the protection of those who should have been protected by their respective countries of origin.[7] It is an exceptional regime that only applies when required by the exigencies, which are abstractly concentrated in the refugee definition.[8] Focusing on the 1951 Convention, the definition—also referred to as the 'inclusion clause' of the Convention—indicates to whom the Convention applies, and the cessation clauses define when the Convention shall cease to apply to them.[9] When it ceases to apply, the laws and regulations that otherwise govern the entry, stay, and departure of aliens apply once more. Indeed, "[w]ithout the protection of refugee law, the individual concerned is in the same position as any other non-citizen; he or she is subject to removal . . . ."[10]

The 1951 Convention does not indicate what laws apply with respect to those who are its concern on the basis of its inclusion clause when the Convention itself ceases to be applicable with respect to those persons. The fact that it does not indicate such is not, however, an uncommon feature. To the contrary, special temporary applicable rules of law that trump those that apply in normal situations rarely, if ever, indicate what law applies when they themselves cease to be applicable. The possibility of suspending the observance of specified human rights, for instance, in the words of the 1966 Convention on Civil and Political Rights, when the life of the nation is threatened by a public emergency[11] is not accompanied by the reminder that this suspension gives way to the obligation to fully observe all the rights

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[7] Hathaway, *supra* note 2, at 177 (speaking of "surrogate international protection").

[8] *See* 1951 Convention, *supra* note 6, at art. 1.

[9] *Id.* at art. 1(C).

[10] Hathaway, *supra* note 2, at 178–79.

[11] International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 4, 992 U.N.T.S. 3 (entered into force Mar. 23, 1976).

enumerated in the Convention once the emergency is over.[12] This is self-evident and need not be explained. The Geneva Conventions and Protocols, which govern the law relating to armed conflict, do not include provisions stipulating that the law that applies in time of peace is applicable once again when these instruments cease to be applicable.[13] It is conceivable that a treaty that constitutes such a special regime would actually state the law that applies—and subsequent applicable law would also need to be specified—when it, itself, is no longer applicable. It is a moot point whether such an explication would carry any legal weight beyond the temporal and jurisdictional limits of the treaty's own applicability. It would rather constitute a legally vain attempt to ruling from the other side of the grave. Consequently, the fact that a special regime does not indicate what the law is beyond its own reach does not create a conceptual void,[14] but most likely avoids confusion and legal insecurity.

UNHCR's Statute governs the work of the agency with regard to the same exceptional circumstances as in the 1951 Convention, and shares the exceptional nature of the 1951 Convention in the sense indicated. UNHCR is charged with providing international protection and seeking durable solutions to the problem of refugees—tasks that indicate UNHCR is supposed to focus on refugees rather than others.[15] The fact that UNHCR's mandate *ratione personae* has been extended throughout the years does not affect this inference in any relevant way, for its mandate with respect to

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[12] *Cf.* Human Rights Committee, CCPR General Comment No. 5, *Derogation of Rights (Art. 4)*, U.N. GAOR, 36th Sess., (1981) *and* Human Rights Committee, General Comment No. 29, *States of Emergency (Art. 4)*, U.N. GAOR, 56th Sess., U.N. Doc. CCPR/C/21/Rev.1/Add. 11 (2001). Neither one of these contain any such reminder.

[13] Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3316 (entered into force Oct. 21, 1950); Geneva Convention for the Amelioration of Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Protection of Civil Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 (entered into force Oct. 21, 1950); Protocol Added to the Geneva Convention of Aug. 12, 1949, art. 18, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978); Protocol Added to the Geneva Convention of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978).

[14] This void is implied by Hathaway, *supra* note 2, at 183.

[15] *See* Statute of UNHCR, *supra* note 6.

those of its concern ceases too on the basis of cessation clauses.[16]

Leaving aside the fact that UNHCR has actually hinted at the possibility of return of former refugees,[17] reproaching UNHCR for the omission to take it up in a structural way, thereby causing the alleged conceptual incoherence in the refugee law regime, would only be justified if this omission could be viewed as contrary to its Statutory tasks, such as, considering Hathaway's concern, promoting the admission of refugees to the territories of states.[18] If the repatriation of former refugees is considered to contribute to regenerating the asylum capacity of states, a causal link is thereby suggested between the right to repatriate former refugees and the admission of ("new") refugees. There are no compelling arguments that substantiate the existence of such a causal link, as will be set out in Part II.D *infra*. In the absence of such a link, there is no legal argument that justifies holding UNHCR accountable for the pertinent omission.[19]

B. *The Fifth and Sixth Cessation Clauses*

Obviously, the criticism of the omission to address the repatriation of former refugees would hit the mark if the fifth and sixth cessation clauses in any way address the question of repatriation of former refugees. If so, Hathaway's call for a "Convention-based understanding of repatriation" would be fully justified. This section will explore the meaning of the pertinent cessation clauses. It will do so to the limited extent necessary to identify the temporal limits of the 1951 Convention as a special regime in the sense indicated earlier.

The text of the two clauses in the 1951 Convention runs as follows:

> This Convention shall cease to apply to any person which falls under

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[16] Note, though, that UNHCR claims to retain a role with respect to those persons who lost their refugee status as a result of the fifth and sixth cessation clauses "for a period of grace." UNHCR, *Guidelines*, *supra* note 3, at para. 25 (viii). For the text of the fifth and sixth cessation clauses, *see infra* Part II.B.

[17] The fact that cessation of refugee status may bring about the return of the person concerned, which in turn may entail breaking ties, social networks, and employment in the country of asylum, induced UNHCR cautions against a premature or insufficiently grounded application of the cessation clauses. *Id.* at para. 7.

[18] Statute of UNHCR, *supra* note 6, at para. 8 (d).

[19] With regard to the charge that UNHCR's silence on the possibility of repatriation of former refugees facilitates return of refugees, alternatively a premature loss of refugee status, see *infra* Part II.D.

the terms of its inclusion clauses if:

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> (5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;
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> (6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.[20]

Central to both clauses, ultimately, is the restoration or availability of protection. The availability of protection is singled out in UNHCR's Guidelines on Cessation[21] and repeated by Hathaway, disregarding the difference in wording between the two cessation clauses, even though the sixth one appears to hint at actual return.[22] The fifth clause is confined to reavailment of protection whilst the sixth one refers to the ability to return. It

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[20] The initial drafts of what would eventually become the 1951 Convention did not include these two clauses. France suggested amending the text of the draft convention (*i.e.*, the version contained in U.N. GAOR 3d Comm., U.N. GAOR, 5th Sess., app. II, U.N. Doc. A/1385 (1950)) by adding the following new paragraph to that part of the definition that identified those to whom the convention would not apply: "The circumstances in connexion [sic] with which he has been recognized as a refugee have ceased to exist and he can no longer claim valid grounds for continuing to refuse to avail himself of the protection of the government of the country of his nationality." U.N. GAOR 3d Comm., U.N. GAOR, 5th Sess., U.N. Doc. A/C.3/L.123 (1950). On November 29, 1950, an informal working group was formed to take this and other amendments relating to the definition into consideration. On December 1, 1950, this working group presented revised joint compromise amendments (U.N. GAOR 3d Comm., U.N. GAOR, 5th Sess., U.N. Doc. A/C.3/L.131/Rev.1 (1950)), which were subsequently discussed by the Third Committee of the General Assembly, in particular at its 332d session. The discussion, however, did not include consideration of the cessation clauses pertaining to changed circumstances. *See* U.N. GAOR 3d Comm., 5th Sess., 332d mtg., U.N. Doc. A/SR.332 (1950).

[21] UNHCR, *Guidelines*, *supra* note 3, at 4.

[22] *See* Hathaway, *supra* note 2, at 184, 185, 188–91.

is submitted that the reference to the ability to return in the sixth clause should be taken as the functional equivalent of the protection mentioned in the fifth one as a circumscription that has solely been induced by the lack of nationality of this category of refugees. "Return" is, moreover, used in an active sense, which corroborates this submission, rather than in a passive one, which would signify the possibility of mandatory return. The difference in wording would, consequently, seem to be irrelevant in the present context: The cessation clauses define the moment the country of asylum may cease to extend its protection on the basis of the 1951 Convention.

The delegate of France, in the debates held by the Conference of Plenipotentiaries charged with adopting the text of the 1951 Convention, observed that, "[t]here was no reason, for example, why France should continue to shoulder the burden of certain refugees, when that burden naturally devolved upon the government of the country of which they were nationals."[23] However, this observation should be read with an emphasis on "refugees," for the same delegate also pointed out that, "if an immigrant was deprived of his refugee status, that would not compel him to return to his country of origin."[24] The delegate of Israel "agreed that to withdraw the status of refugee need not have serious consequences for the refugee in question, because he would still be protected by the national laws of his country of refuge . . . ."[25] When the same delegate drew attention to the somewhat contradictory nature of the French observations, the French delegate replied that "France had merely said that she did not wish to be

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[23] U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 28th mtg. at 12, U.N. Doc. A/CONF.2/SR.28 (1951) [hereinafter Conference, 28th mtg.]. Note that Hathaway, *supra* note 2, at 185, refers to observations made by the same delegate, but to press home a different point, to wit, the intention of the drafters of the 1951 Convention that only a *fundamental* change of circumstances in the country of origin would justify cessation of refugee status.

[24] Conference, 28th mtg., *supra* note 23, at 11. "Immigrant" should be taken to refer to "refugee" and "deprived" to cessation of refugee status. *See id.* France also referred to the Constitution of the International Refugee Organization (IRO) to point out that it had actually required return with respect to Spanish refugees when a democratic regime has been restored in Spain. *Id.* at 14–15.

[25] *Id.* at 12. "Withdraw" should be taken to mean cessation of refugee status. *See id.* This conclusion has fairly recently been repeated in comparable terms by Joan Fitzpatrick, Current Issues in Cessation of Protection Under Article 1 C of the 1951 Convention and Article I.4 of the 1969 OAU Convention (June 1, 2001), at para. 10 (background paper for an expert roundtable on cessation as part of UNHCR's Global Consultations and available at the UNHCR website, http://www.unhcr.ch/cgi-bin/texis/vtx/global-consultations).

under an obligation to continue to provide assistance to refugees who could seek the protection of their country of origin."[26] In short, the possibility of cessation of refugee status solely indicates when the obligation of states parties to extend protection on the basis of the 1951 Convention comes to an end.

C. *The Law Relating to Former Refugees*

The logical corollary of legal regimes that only apply in specified situations is that the rules that apply after they cease to be applicable have to be sought outside those regimes. The 1951 Convention defines in the cessation clauses when the Convention ceases to apply to those it previously did on the basis of its inclusion clause, that is, the refugee definition. As set out in the preceding section, the cessation clauses define when refugee protection is no longer needed: "Article 1C of the 1951 Convention literally applies only to the formal termination of previously granted refugee status."[27] Consequently, the fate of those who have ceased to be refugees in virtue of the cessation clauses is regulated by other (international) law than the 1951 Convention and cannot, therefore, be "Convention-based."[28] The question is what law regulates the fate of these people, a question that has been addressed by Hathaway in terms of the constraints on lawful repatriation.

The constraints identified by Hathaway are distilled from a critical analysis of the norms that are part of the composite standard of "safety and dignity." Paradoxically enough for this composite is the shorthand designation of the substantive norms that have been developed and are promoted by UNHCR to govern the voluntary repatriation of refugees and their subsequent reintegration as returnees in the country of origin.[29] The

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[26] Conference, 28th mtg., *supra* note 23, at 14.

[27] Fitzpatrick, *supra* note 25, at para. 3. Put differently, the observation of Hathaway that the right of state parties to undertake mandated repatriation follows quite directly from satisfaction of the criteria for cessation on the basis of the fifth and sixth cessation clauses is unaffected; only the implication that this right would in any way be based on the 1951 Convention is challenged. Hathaway, *supra* note 2, at 191.

[28] Hathaway, *supra* note 2, at 191–92.

[29] The Executive Committee confined itself to recommending states deal humanely with the consequences of cessation for the affected individuals or groups and that countries of asylum and countries of origin should together facilitate the return to assure that it takes place in a fair and dignified manner. UNHCR, Executive Committee Conclusion No. 69 (XLIII), *Cessation of Status*, U.N. GAOR, 47th Sess., at (f) (1992).

contention that the safety and dignity standard overstates the real obligations of governments effectuating the mandatory return of former refugees[30] is consequently tantamount to countering a straw man position since the pertinent obligations are part of the solution of voluntary repatriation of refugees as a durable solution.[31] The "only" norms that are identified by Hathaway as governing mandatory repatriation of former refugees are summarized as the "rights to security of person; to be free from cruel, inhuman, or degrading treatment; and not to be subjected to arbitrary or unlawful inference with his or her family life,"[32] which in particular signifies that return will be suspended to allow, for instance, the recovery of those who are ill and to complete a school term for those who have minor schoolgoing children.[33]

All Executive Committee Conclusions are available at the UNHCR Executive Committee's website, http://www.unhcr.ch/cgi-bin/texis/vtx/excom. With respect to the return of asylum seekers and persons not in need of international protection, the Executive Committee calls for returns in a humane manner with respect for their human rights: as far as could be ascertained, the mode of return of these persons has twice been qualified by reference to "safety and dignity." *See* UNHCR, Executive Committee Conclusion No. 79 (XLVII), *General Conclusion on International Protection*, U.N. GAOR, 51st Sess., at (u) (1996); UNHCR, Executive Committee Conclusion No. 81 (XLVIII), *General Conclusion on International Protection*, U.N. GAOR, 52d Sess., at (s) (1997). In view of the fact that later conclusions do not repeat this qualification, which is part and parcel of the solution of voluntary repatriation of refugees, its use with respect to others rather than refugees is most likely just an oversight. *See, e.g.*, UNHCR, Executive Committee Conclusion No. 85 (XLIX), *Conclusion on International Protection*, U.N. GAOR, 53d Sess., at (bb) (1998); UNHCR, Executive Committee Conclusion No. 96 (LIV), *Conclusion on the Return of Persons Found Not to be in Need of International Protection*, U.N. GAOR, 58th Sess., at (c) (2003).

[30] Hathaway, *supra* note 2, at 211.

[31] *See* Marjoleine Y.A. Zieck, *Voluntary Repatriation: Paradigm, Pitfalls, Progress*, 23 REFUGEE SURV. Q., Oct. 2004, at 33, 37.

[32] Hathaway, *supra* note 2, at 191, 207, 209, 210, 216. Those rights are identified as corresponding with article 6, article 7, paragraph 1, article 9, paragraph 1, article 10, and article 17 of the 1966 International Covenant on Civil and Political Rights, *supra* note 11; article 10, paragraph 1, article 11, article 12, and article 13, paragraph 2(a) of the 1966 Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) (Hathaway mentions article 23 and article 24 also, but it is not clear why); and articles 2, 8, 9, and 10 of the 1989 Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 48, at 166, U.N. Doc. A/RES/44/25 (1989) (entered into force Sept. 2, 1990).

[33] *See, e.g.*, Hathaway, *supra* note 2, at 214.

It is submitted the identified norms do not exhaust those which are applicable, since the enumeration is confined to the norms that govern actual return as if cessation is "a device to trigger automatic return," which it is not.[34] Preceding actual return, there are other legal constraints that are part and parcel of the right of states to repatriate aliens, a right that is usually referred to in terms of expulsion and deportation. In fact, "repatriation" is a misnomer, for the right to expel aliens does not necessarily include the right to decide the country of destination.[35] The legal constraints involved may partly be inferred from the wording of several provisions. At the universal level, Article 13 of the 1966 Covenant on Civil and Political Rights provides that:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.[36]

Note that this Article applies to any obligatory departure of an alien regardless of whether it is described in national law as expulsion or otherwise.[37]

The main regional human rights treaties contain similar provisions. In its Article 22, paragraph 6, the 1969 American Convention on Human Rights provides that, "An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law."[38] Under Article 12, paragraph 4 of the 1981 African Charter on Human Rights and Peoples' Rights, "A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law."[39]

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[34] Fitzpatrick, *supra* note 25, at para. 10.

[35] MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 228 (1993).

[36] International Covenant on Civil and Political Rights, *supra* note 11, at art. 13.

[37] Human Rights Committee, CCPR General Comment No. 15, *The Position of Aliens under the Covenant*, U.N. GAOR, 41st Sess., at para. 9 (1986).

[38] 1969 American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

[39] African Charter on Human Rights and Peoples' Rights, *opened for signature* July

Similarly, in Article 1, paragraph 1 of the Seventh Protocol (1984) to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms:

> An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
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> a. to submit reasons against his expulsion,
>
> b. to have his case reviewed, and
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> c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.[40]

In most of the quoted provisions—discussion is possible about the legal significance of the difference between the qualifications of 'lawfully resident' and 'legally admitted'—the procedural rights are predicated on lawful stay. With respect to the 1966 Covenant on Civil and Political Rights, Nowak observed that, "An alien's residency is lawful when he or she has entered the State of residence in accordance with its legal system (not necessarily a law in the formal sense) and/or is in possession of a valid residency permit . . . ."[41] With respect to states parties to the 1951 Convention, the evaluation of the legality of residence of refugees is to be determined by taking the relevant provisions of the 1951 Convention into consideration, in particular Article 31 thereof.[42] Moreover, when the legality of stay is disputed in a given case, the Human Rights Committee is of the view that the procedural guarantees of Article 13 are nevertheless to be applied.[43]

With respect to refugees who have been admitted as such, the legality of

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27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5, 21 I.L.M. 58 (1992) (entered into force Oct. 21, 1986).

[40] Protocol No. 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 22, 1984, 24 I.L.M. 435, E.T.S. No. 117, at 2 (entered into force Nov. 1, 1988). Note that the concept of expulsion is used in a generic sense in this provision as meaning any measure compelling the departure of an alien from the territory. Explanatory Report to Protocol No. 7, para. 10. Article 1, paragraph 2 allows expulsion before the exercise of the rights listed in paragraph 1 when required in the interests of public order or on account of national security.

[41] NOWAK, *supra* note 35, at 224.

[42] *Id.*

[43] *Id.* at 225; Human Rights Committee, CCPR General Comment No. 15, *supra* note 37, at para. 9.

residence in relation to entry is obviously not an issue; those refugees can be qualified to be lawful residents. Yet, when the cessation clauses have been invoked, the former refugee cannot anymore be considered an alien who is lawfully a resident. This would entail that the safeguards the procedural requirements constitute with respect to expulsion do not apply with regard to those former refugees. However, in view of the fact that those former refugees entered the state of residence in accordance with its legal system,[44] they would nevertheless be entitled to the safeguards indicated.

In short, his lawful residency in the sense indicated entitles the former refugee to a decision regarding his expulsion in accordance with the law, and to the various procedural rights enumerated in the quoted provisions, such as a hearing, appeal to a higher instance, the right to be informed of the remedies, and the right to be represented.[45] The Human Rights Committee made it clear, moreover, that the requirement of a decision which is taken in accordance with the law goes beyond the procedural guarantees that are listed in Article 13 and authorizes to review the substantive requirements of the law to be applied.[46] Thus, preceding actual departure (perhaps return), there are other legal constraints than those that have been identified by Hathaway which form part of the right of states to expel aliens. In particular, there are constraints that allow the prospective expellee to put forward any claim, such as those based on acquired rights, to remain in the country following his loss of refugee status.

This particular claim is not accommodated by the procedural requirements regarding the application of the cessation clauses of the 1951 Convention; those clauses, and the reference will throughout be to the fifth and sixth cessation clauses, solely focus on cessation of refugee status. They assume that refugee status is no longer warranted, and the burden of proof rests on the refugee to refute that particular conclusion. He can only do so by demonstrating he still qualifies as a refugee in terms of the definition included in the 1951 Convention, and he may not invoke any other rights unless the state concerned allows an appeal to traumatic experiences arising

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[44] See the above-quoted explanation of the meaning of lawful residence in NOWAK, *supra* note 35, at 224.

[45] Note that the procedural requirements that are included in article 13 are based on article 32 of the 1951 Convention. MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 269 (1987).

[46] NOWAK, *supra* note 35, at 226 (making reference to the 1979 case of *Marafidou v. Sweden*); *see also* Human Rights Committee, CCPR General Comment No. 15, *supra* note 37, at para. 10.

from past persecution.[47] If, though, cessation is coupled with the possibility of expulsion, considerations that bar expulsion will be evaluated, including, in particular, an assessment of any claim with respect to continued stay.[48] In addition, those considerations will have to include international human rights obligations in order to ascertain that the former refugee will not be exposed, following expulsion, to cruel, inhuman, or degrading treatment.[49]

D. *Regeneration of Asylum Capacity*

Implicit throughout Hathaway's article is the assumption that a clear understanding of the possibility of repatriation of former refugees may create the physical and mental space to (re)generate the asylum capacity and preparedness on the part of states.[50] The legal constraints governing expulsion, however, do not have this regenerating effect.

First of all, reference should be made to the hesitant, even reluctant, if at all existing, practice of states with regard to invoking the fifth and sixth cessation clauses. This reluctance may be explained by past practice that induced granting asylum on an indefinite basis in conjunction with provisions in the 1951 Convention which favor integration in the country of asylum (by means of naturalization or the grant of another durable legal status), a practice which invited the qualification of the 1951 Convention as demonstrating an exilic bias.[51] Even if the considerations that caused this

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[47] But see Hathaway's criticism of UNHCR's attempt to construe this exception as a legally binding one. Hathaway, *supra* note 2, at 204–06. For a different analysis, see Fitzpatrick, *supra* note 25, at paras. 69–70, 75. *See also* David Milner, *Exemption from Cessation of Refugee Status in the Second Sentence of Article 1C(5)/(6) of the 1951 Refugee Convention*, 16 INT'L J. OF REFUGEE L. 91 (2004). The Netherlands can be mentioned as a state party to the 1951 Convention that allows invoking this exception.

[48] *See infra* Part II.D, 14–15.

[49] *See* International Covenant on Civil and Political Rights, *supra* note 11, at art. 7; 1950 European Convention on Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222, E.T.S. No. 5, art. 3 (entered into force Sept. 3, 1953); 1969 American Convention on Human Rights, *supra* note 38, at art. 22, para. 6.

[50] Hathaway makes this point explicitly in the conclusion. *See* Hathaway, *supra* note 2, at 215. For a similar view, see Michael Barutciski, *Involuntary Repatriation When Protection is No Longer Necessary: Moving Forward after the 48th Session of the Executive Committee*, 10 INT'L J. OF REFUGEE L. 236, 242, 254 (1998).

[51] This particular qualification was made by Hathaway. *See* James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee* Law, 31 HARV. INT'L L.J. 129, 160, 183 (1990).

legal bias have ceased to apply, the legally relevant fact remains that the 1951 Convention still includes a number of provisions that enable and favor integration in the country of asylum.[52] Second, what has been qualified as a 'renewed interest in cessation' has not so far resulted in an increase in formal termination of refugee status.[53] Apart from the exilic bias of the 1951 Convention, the actual integration of refugees in the country of asylum may account for this, an integration which may entitle one to prolonged stay upon cessation as the logical corollary of acquired rights.[54] Moreover, the procedural issues involved, as exacting as those which apply to processing asylum claims,[55] in themselves already constitute a prohibitive bar. The procedural requirements concerning expulsion hinted at in the preceding section only enlarge the procedural burden involved. Practice regarding those constraints, with respect to asylum seekers whose claims have been rejected and who seek to prevent expulsion by invoking these rights by relying on those constraints, have congested courts and created huge procedural expenses.[56]

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[52] Fitzpatrick accordingly observes that "reconciling Article 1C to Articles 12–30 poses dilemmas for asylum states and for UNHCR." Fitzpatrick, *supra* note 25, at para. 35.

[53] *Id.* at para. 4. With respect to the feasibility of involuntary return, a number of arguments, including the probability that safe conditions may independently induce return, are adduced, which combine "to deprioritize this type of control measure." *Id.* at para. 85.

[54] *See infra* note 58 and accompanying text. These considerations may account for the reason the Executive Committee and UNHCR have not included former refugees in their considerations pertaining to the return of persons not in need of international protection. *See infra* note 66.

[55] *See* Fitzpatrick, *supra* note 25, at paras. 50, 51, 63, 66, 105; Joan Fitzpatrick & Rafael Bonoan, *Cessation of Refugee Protection*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 491, 515 (Erika Feller et al. eds., 2003).

[56] *See* Matthew J. Gibney & Randall Hansen, Deportation and the Liberal State: The Forcible Return of Asylum Seekers and Unlawful Immigrants in Canada, Germany and the United Kingdom 2, 10–11 (Feb. 2003) (UNHCR New Issues in Refugee Research Working Paper No. 77, available at UNHCR's website, http://www.unhcr.ch) (discussing the reluctance or inability of states to invoke deportation on account of the rights-based constraints bounding deportation). On the ineffectivity of deportation, see *id.* at 7. On backlogs (in general), see *Justice Department to Reduce Number of Judges Hearing Immigration Appeals*, THE LEGAL INTELLIGENCER, Feb. 7, 2002, *available at* LEXIS, News Library, Allnws File (describing backlogs in the USA); Phillip Johnston, *Refugees are Playing the System, Says Judge*, THE DAILY TELEGRAPH, Apr. 10, 2003, *available at*

Some aspects of those procedural constraints should be mentioned to illustrate the point made. The procedural constraints invariably refer to a decision which has been taken in accordance with the law.[57] The law will usually prescribe entitlements on the basis of length of legal stay in the country concerned,[58] a tangible basis that is usually and loosely referred to in terms of "acquired rights."[59] The existence of such rights renders the assumption that cessation necessarily leads to repatriation,[60] as if cessation is indeed a device that triggers automatic return (or expulsion) moot. A decision to cease refugee status will consequently often give way to another status that entitles the person concerned to continue stay in the country, particularly when the refugee can invoke the fact of prolonged legal stay.[61]

LEXIS, News Library, Allnws File (describing backlogs in the UK); on congested courts, see Associated Press, [Australian] *Courts Choked by Illegal Immigrants' Appeals to Deportation*, Aug. 27, 2001 (illustrating also the procedural costs involved—an application for review costs an average of $5,350, and $10.7 million were spent on applications in 2000–2001).

[57] 1969 American Convention on Human Rights, *supra* note 38, at art. 22(6); African Charter on Human and Peoples' Rights, *supra* note 39, at art. 12(4); Protocol No. 7, *supra* note 40, at art. 1(1).

[58] Türk and Nicholson refer to the state practice of granting long-term residence status to those whose long stay in the host state has resulted in strong family, social, and economic ties. Volker Türk & Frances Nicholson, *Refugee Protection in International Law: An Overall Perspective*, *in* REFUGEE PROTECTION, *supra* note 55, at 3, 32. Moreover, "[i]f an alien has developed such a close relationship to his or her State of residence that it has become his (her) 'home country,' s(he) is entitled, in addition to Article 13, to the nearly unrestricted protection against expulsion under Art. 12(4)." NOWAK, *supra* note 35, at 224–25 (making reference to the 1966 Covenant on Civil and Political Rights). For more, see Walter Kälin who, with reference to two views of the Human Rights Committee (*Stewart v. Canada* (1996) and *Giosuè Canepa v. Canada* (1997)), maintains that, "What must be decisive in the context of Article 12(4) ICCPR is . . . that the link between the immigrant and the country of immigration has become so intensive that the country of origin is now the point of reference in his or her life." Walter Kälin, *Limits to Expulsion under the International Covenant on Civil and Political Rights*, *in* DIRITTI DELL'UOMO, ESTRADIZIONE ED ESPULSION; ATTI DEL CONVEGNO DI STUDIO ORGANIZATO DALL'UNIVERSITÀ DI FERRARA PER SALUTARE GIOVANNI BATTAGLINI 143, 151 (Francesco Salerno ed., 2003).

[59] *See* UNHCR, Executive Committee Conclusion No. 69, *supra* note 29, at (e).

[60] Hathaway speaks of the "obvious linkage between satisfaction of the test for cessation of status under Article 1C (5–6) and the right of state parties mandatorily to repatriate former refugees to their country of origin." Hathaway, *supra* note 2, at 183; *see also supra* note 25.

[61] *Cf.* UNHCR, *Guidelines*, *supra* note 3, at para. 3. In the Netherlands, asylum

Comparable legal constraints operate with respect to substantial refugee populations. For those states that host large refugee populations (various African states hosting Angolan refugees may be mentioned here), "repatriation of former refugees" would in theory constitute a means that would literally create space for granting other refugees asylum in those states. Assuming that circumstances in Angola would justify the cessation of refugee status on the basis of the fifth and sixth cessation clauses, the sheer number of former refugees involved would bar their expulsion. All three regional human rights treaties are very clear on this point.[62] First, Article 22, paragraph 9 of the American Convention stipulates that "[t]he collective expulsion of aliens is prohibited."[63] Similarly, Article 12, paragraph 5 of the 1981 African Charter on Human Rights and Peoples' Rights stipulates that "[t]he mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups."[64] Likewise, Article 4 of the Fourth Protocol (1963) to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms says "[c]ollective expulsion of aliens is prohibited."[65] These provisions do not constitute an absolute bar to expulsion, but they do mean that each individual should be considered separately.

In view of those constraints, expulsion of former refugees will in

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seekers considered to qualify as refugees in the sense of the 1951 Convention will be granted asylum for the duration of three years. During those three years, the fifth and sixth cessation clauses may be invoked as appropriate; after those three years have expired, asylum will be granted for an indefinite period of time and the fifth and sixth cessation clauses can no longer be invoked. *See* ALDO KUIJER & J.D.M. STEENBERGEN, NEDERLANDS VREEMDELINGENRECHT, 134–35, 369–70 (2002). Effective as of September 1, 2004, asylum will not anymore be granted for three years, but instead for five years.

[62] Article 13 of the 1966 Covenant on Civil and Political Rights should be understood as leading to a similar result. NOWAK, *supra* note 35, at 226; Human Rights Committee, CCPR General Comment No. 15, *supra* note 37, at para. 10 (noting that article 13 entitles each alien to a decision in his own case). Note that the announcement of France that it ended the practice of deportation of groups of illegal immigrants by chartered flight to their home countries was welcomed by the Human Rights Committee in 1997. Gregor Noll, Rejected Asylum Seekers: The Problem of Return, 25–26 (May 1999) (UNHCR New Issues in Refugee Research Working Paper No. 4, available at UNHCR's website).

[63] 1969 American Convention on Human Rights, *supra* note 38.

[64] African Charter on Human Rights and Peoples' Rights, *supra* note 39.

[65] Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 1496 U.N.T.S. 263, E.T.S. No. 46 (entered into force May 2, 1968).

practice either be rare or, alternatively, violate the prohibition of collective expulsion. Either scenario is unlikely to engender regenerated asylum preparedness. Consequently, UNHCR's failure to address the repatriation of former refugees does not contravene its Statutory obligation to promote the admission of refugees to the territories of states.

The desire to enhance the asylum capacity and preparedness on the part of states may rather be realized by ensuring that those who do not qualify as refugees are expelled. The inability to effect the expulsion of those who do not qualify for refugee status or legal stay on humanitarian grounds adversely affects the institution of asylum.[66] For instance, Britain is not capable of deporting more than ten percent of unsuccessful asylum seekers, and thus many of them have a good chance of remaining in Britain.[67] With respect to those who can eventually be expelled, the costs involved are almost prohibitive, both financially and politically.[68] Conscious of the fact

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[66] UNHCR and the Executive Committee recognize the adverse effect of the inability to expel those who do not qualify for refugee or any other status on the institution of asylum. *See, e.g.*, UNHCR, Executive Committee Conclusion No. 96, *supra* note 29, at preamble and (b); UNHCR, Executive Committee Conclusion No. 71 (XLIV), *General Conclusion on International Protection*, U.N. GAOR, 48th Sess., at (j) (1993); UNHCR, Executive Committee Conclusion No. 74 (XLV), *General Conclusion on International Protection*, U.N. GAOR, 49th Sess., at (j) (1994); UNHCR Standing Committee, *Return of Persons Not in Need of Protection*, U.N. ESCOR, 3d mtg. at para. 18, U.N. Doc. EC/46/SC/CRP.36 (1997) *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/excom; UNHCR Standing Committee, *Return of Persons Not in Need of Protection*, 8th mtg., U.N. ESCOR, at paras. 13–16, U.N. Doc. EC/47/SC/CRP.28 (1997). None of those documents refer to the return of former refugees, which is indicative of the observation that their return is not viewed as something that would contribute to creating asylum space in any sense. Press clippings also illustrate the negative effects of the inability to expel rejected asylum seekers on the institution of asylum. *See, e.g.*, Paul Waugh, *Home Office Plans Huge Rise in Deportations*, THE INDEPENDENT, Feb. 14, 2001 *available at* LEXIS, News Library, Indpnt File; *Ireland and Bulgaria Sign Pact on Illegal Immigrants*, AGENCE FRANCE-PRESSE, Jan. 31, 2002 *available at* 2002 WL 2329700 (referring to the numbers of asylum seekers straining social and housing services); Associated Press, *UK: Government to Press Ahead with Tough Curbs on Asylum-Seekers*, June 11, 2002; Johnston, *supra* note 56.

[67] CTK News Agency, *Britain Not to Give Advance Notice of Asylum Seekers' Deportations*, BBC WORLDWIDE MONITORING: INTERNATIONAL REPORTS—EUROPEAN STORIES, Sept. 24, 2002, *available at* LEXIS, News Library, Bbcmir File.

[68] In addition to the procedural expenses involved, referred to earlier, reference can be made to the costs of actual implementation of deportation orders, including apprehension of the prospective expellees and the logistical problems and costs in enforcing return, *e.g.*, chartering flights and the political costs involved. *See* Gibney &

that failure to solve it boils down to undermining the whole idea of rules which govern the entry and stay of aliens, various attempts have been made to solve this problem.[69] Those attempts include alternatives to expulsion and/or deportation, such as offering free flights home,[70] repatriation premiums,[71] and institutionalizing deterrents, including rapid or fast-track deportation within one or two days if the application is "clearly unfounded,"[72] and the establishment of removal or deportation centers,[73] setting deportation targets (essentially an exercise in wishful thinking),[74] and concluding bilateral return or readmissions agreements (also referred to as "deportation deals") in order to facilitate and ensure the deportation of failed asylum seekers (to overcome such problems as the lack of the requisite documentation pertaining to identity and nationality that is required in order to obtain travel documents from the country of origin).[75] The second means

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Hansen, *supra* note 56, at 11–12.

[69] *Id.* at 14 ("The nation-state has not lost control over entry to its borders; it has rather lost control over movement *within* and *from* its borders." (emphasis original)).

[70] *New Irish Scheme Offers Asylum Seekers Free Flights Home*, AGENCE FRANCE-PRESSE, Nov. 20, 2001, *available at* 2001 WL 25067243.

[71] *Voorstel Verdonk: Verdubbeling vertrekpremie asielzoekers*, NRC HANDELSBLAD, June 21, 2004; *Europa ontdekt vrijwillig terugkeerbeleid*, NRC HANDELSBLAD, Aug. 10, 2004; *Geen vrijwillige terugkeer zonder enige dwang*, NRC HANDELSBLAD, Aug. 10, 2004.

[72] *UK: Government to Press Ahead*, *supra* note 66; *Norway: Fast-Track Deportation for Asylum Seekers*, INFOPROD, Dec. 19, 2002, *available at* LEXIS, News Library, Allnws File.

[73] Waugh, *supra* note 66 (doubling the size of the detention estate); Andy Kelly et al., *UK: Airport Security Fears Over 'Removal Centre'*, DAILY POST, Feb. 15, 2002, *available at* LEXIS, News Library, Dlypst File; *UK: Tougher Measures for Rejected Asylum Seekers Announced*, AGENCE FRANCE-PRESS, Feb. 25, 2002, *available at* 2002 WL 2348630; Anthony Deutsch, *Netherlands Opens First 'Deportation Centre' for Immigrants*, CANADA PRESS, June 27, 2003, *available at* 2003 WL 58530817; *Eerste vertrekcentrum asielzoekers in Ter Apel*, NRC HANDELSBLAD, June 8, 2004.

[74] The apparently popular practice of setting deportation targets in the United Kingdom is explained by Gibney and Hansen as an obsession with numbers that is a particular feature of British deportation policy. Gibney & Hansen, *supra* note 56, at 8.

[75] Note in that respect that an estimated 80% of those who seek asylum in the Netherlands do not carry any documents regarding their identity and nationality. On concluding return agreements, see *Ireland to Sign Deportation Deals with Poland and Bulgaria*, AGENCE FRANCE-PRESSE, Jan. 25, 2001, *available at* 2001 WL 2328226; *Ireland and Bulgaria Sign Pact*, *supra* note 66; *Verdonk wil hulp China bij terugkeer*, NRC HANDELSBLAD, June 1, 2004 (describing the travel of the Netherlands' Secretary of

to renew asylum capacity consists of the promotion of voluntary repatriation of those who qualify as refugees (viewed in terms of the constraints that qualify the right of states to expel aliens including former refugees, it comes as no surprise that the international community of states hails this particular solution as the ideal one). UNHCR clearly concentrates on this solution. The extent to which it does has invited the criticism of institutional overreaching.

III. INSTITUTIONAL OVERREACHING

A. *Prominence of UNHCR*

The charge of institutional overreaching is predominantly based on two interrelated perceptions: UNHCR's *de facto* dominance in voluntary repatriation practice and UNHCR's actions which promote states' deference to UNHCR's voluntary repatriation practice. It is submitted that the practice of institutional overreaching as indicated follows from the allocation of protection responsibilities from which the refugee law regime proceeds.[76]

When UNHCR was created and the text of its Statute was drafted, the question of the responsibilities that would become those of the new agency was explicitly addressed. It was taken up in order to closely circumscribe the nature of the new agency, particularly to ensure it would not become an operational agency, as had been its direct predecessor, the International Refugee Organization (IRO), a pre-eminently operational agency with a broad mandate and matching resources.[77] In the new, post-war set-up, the primary responsibility for the protection of refugees would rest with states, and UNHCR's role would essentially be complementary to that of states (and non-operational at that).[78] The nexus between UNHCR's role and the

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State to China with a view to cutting a deportation deal).

[76] On the meaning of the designation "refugee law regime," see *supra* note 6.

[77] On the International Refugee Organization, see LOUISE W. HOLBORN, THE INTERNATIONAL REFUGEE ORGANIZATION: A SPECIALIZED AGENCY OF THE UNITED NATIONS, ITS HISTORY AND WORK 1946–1952 (1956).

[78] Instructive for the "working of the new system" is the illustration made by France with reference to two hypothetical cases. U.N. GAOR 3d Comm., 4th Sess., 263d mtg., at para. 11, U.N. Doc. A/C.3/SR.263 (1949). *See also* U.N. GAOR 3d Comm., *France: Draft Resolution*, U.N GAOR, 4th Sess., Annex, U.N. Doc. A/C.3/529 (1949); U.N. GAOR 3d Comm., *France: Draft Resolution*, U.N GAOR, 4th Sess., Annex, U.N. Doc. A/C.3/L.26 (1949); U.N. GAOR, 3d Comm., 4th Sess., 256th mtg., at paras. 14, 15, U.N. Doc. A/C.3/SR.256 (1949); U.N. GAOR, 3d Comm., 4th Sess., 256th mtg., at para. 39, U.N. Doc. A/C.3/SR.256 (1949) (Belgium); U.N. GAOR, 3d Comm., 4th Sess., 257th

obligations of states was secured by means of a treaty obligation to cooperate with UNHCR.

When the drafting of the 1951 Convention was completed, however, it was obvious that the implied closed circuit of a continuum of obligations of states on the one hand and complementary ones on the part of UNHCR on the other, which would, in principle, end simultaneously, was only partly realized. The common hinge in the form of a uniform definition was lacking. The envisaged continuum failed to materialize in that respect, only to become more visible and problematic in the years to come with the extension of UNHCR's mandate *ratione personae* that was not matched by a similar one on the part of states parties to the universal refugee instruments.

Besides the understanding that UNHCR's role was to be complementary to that of states,[79] UNHCR was given specific tasks and entrusted with distinct responsibilities—including the search for durable solutions to the problem of refugees among which voluntary repatriation figures prominently[80]—that, albeit still qualifiable as complementary to that what states are legally obliged to do, also requires distinctive undertakings on the part of UNHCR. The distinctness of the search for the solution of voluntary repatriation is reinforced by the fact that the 1951 Convention does not refer at all to the possibility of voluntary repatriation, at least not in terms of solutions (for it could be argued that the fourth cessation clause is predicated

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mtg., at para. 32, U.N. Doc. A/C.3/SR.257 (1949) (United Kingdom); U.N. GAOR, 3d Comm., 4th Sess., 258th mtg., at para. 68, U.N. Doc. A/C.3/SR.258 (1949) (France); U.N. GAOR, 3d Comm., 4th Sess., 262d mtg., at para. 12, U.N. Doc. A/C.3/SR.262 (1949) (France: "The High Commissioner's main task would be to negotiate with Governments in order to persuade them to grant legal protection to the refugees on their territories. He could not himself provide that protection . . . ."); U.N. GAOR, 3d Comm., 4th Sess., 263d mtg., at para. 7, U.N. Doc. A/C.3/SR.263 (1949) (France); U.N. GAOR, 5th Sess., 329th plen. mtg., at para. 54, U.N. Doc. A/PV.329 (1950) (France).

[79] Obviously, this complementarity only applies in the sense indicated with regard to states who are parties to the relevant instruments. In those instances where UNHCR was called upon to act in cooperation with states not parties to any of the relevant instruments—nowadays still a reality—its role of necessity became more prominent. *See* UNHCR, Executive Committee Conclusion No. 4 (XXVIII), *International Instruments*, U.N. GAOR, 32d Sess., at (d) (1977) (reaffirming the fundamental importance of UNHCR's Statute in respect to such states).

[80] In that respect, it should be noted that the language of solutions is one that belongs to the realm of refugee law *strictu sensu* and does not apply to solving such problems as the expulsion of rejected asylum seekers and the mandatory return of former refugees.

on voluntary repatriation).[81] As a result, it fell on UNHCR to develop this Statutory task, albeit within the legal confines of the refugee law regime.[82] It could thereby rely on the cooperation it could expect from states by virtue of provisions to that effect comprised in Article 35 of the 1951 Convention,[83] and Article 2 of the 1967 Protocol as will be set out in the next section. Consequently, institutional overreaching on the part of UNHCR appears to be required as a matter of legal principle.

In view of its Statutory tasks and distinct responsibilities, it is not more than reasonable that UNHCR also assumes the overall coordination and implementation of voluntary repatriation on the basis of the norms it was supposed to develop (and which have been sanctioned by its Executive Committee),[84] particularly also considering the fact that voluntary repatriation is a cross-border event which involves more than one, and usually more than two, states. Part of UNHCR's complementary tasks consists in that regard of ensuring that the responsibilities on the part of the

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[81] *See* Hathaway, *supra* note 2, at 175–76. With respect to the observation that voluntary repatriation is in no sense a substitute for satisfaction of the true legal requirements set by the Convention with regard to cessation, see *id.* at 182. However, voluntary repatriation has never aspired to constitute a substitute in the sense indicated. *See* Zieck, *supra* note 31 (describing the relation between the cessation clauses and voluntary repatriation, and providing a brief analysis of the protection this solution entails for the refugees concerned).

[82] "Within" those confines, in other words, the norms which have been developed by UNHCR with regard to voluntary repatriation on the basis of its Statutory task to engage in this very solution (using the leeway of Article 35, paragraph 1 of the 1951 Convention) cannot, as is implied by Hathaway, *supra* note 2, at 182, 192–93, be considered as if they constitute an essentially autonomous and extraneous normative framework that is imposed onto the 1951 Convention. Moreover, voluntary repatriation often, and preferably so, takes place on the basis of so-called special agreements (a designation which follows from Article 8 (b) of the Statute of UNHCR), which require the consent to be bound on the part of states.

[83] Grahl-Madsen suggests that Article 35 gives effect to the obligation to cooperate with the United Nations in the field of human rights as comprised in Article 56 of the Charter of the United Nations: "This brings the observance of the material provisions of the [1951] Convention within the orbit of the vested interests of the United Nations." Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951 Articles 2–11, 13–37*, at 149 (1963) (republished by UNHCR's Division of International Protection in 1997).

[84] The key conclusions are UNHCR, Executive Committee Conclusion No. 18 (XXXI), *Voluntary Repatriation*, U.N. GAOR, 35th Sess. (1980) and UNHCR, Executive Committee Conclusion No. 40 (XXXVI), *Voluntary Repatriation*, U.N. GAOR, 40th Sess., (1985), which are reaffirmed in UNHCR, Executive Committee Conclusion No. 74, *supra* note 66, at (y).

states concerned are allocated and implemented.[85]

B. *The Bermuda Triangle of the 1951 Convention: Article 35, Paragraph 1*

Article 35, paragraph 1 constitutes the legal linchpin of what has been qualified by Hathaway as institutional overreaching. Although this institutional overreaching can be explained as resting on a firm legal basis,[86] the negative purport of the charge made should now be addressed. It is submitted that Article 35, paragraph 1 itself allows, and consequently may invite, this negative charge on account of the fact that it comprises all the features which allow it to function as the legal equivalent of the Bermuda Triangle—that is, a vanishing point. Article 35, paragraph 1 is a blanket norm in that it may comprise anything UNHCR sets out to do, an indefiniteness which is reinforced and enlarged when UNHCR broaches subjects that are not, or not directly, addressed by the 1951 Convention.

Article 35, paragraph 1 provides that:

> The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.[87]

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[85] *See* Zieck, *supra* note 31, at 40.

[86] The Executive Committee has on various occasions reminded states of their obligation to cooperate with UNHCR. *See* UNHCR, Executive Committee Conclusion No. 52 (XXXIX), *International Solidarity and Refugee Protection*, U.N. GAOR, 43d Sess., at (1) (1988); UNHCR, Executive Committee Conclusion No. 57 (XL), *Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, U.N. GAOR, 44th Sess. (1989); UNHCR, Executive Committee Conclusion No. 74, *supra* note 66, at (e); and UNHCR, Executive Committee Conclusion No. 79, *supra* note 29, at (f). States parties to the 1951 Convention recalled their obligations to cooperate with UNHCR in the exercise of its functions and urged states to ensure closer cooperation between states parties and UNHCR to facilitate UNHCR's duty of supervising the application of the 1951 Convention and 1967 Protocol in the 2001 Declaration of States Parties. Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Dec. 13, 2001, operative paragraphs 8 and 9, U.N. Doc. HCR/MMSP/2001/09 (2001).

[87] *See also* 1951 Convention, *supra* note 6, at Preamble ("Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising

The reference to UNHCR's "exercise of its functions" should be taken as an indefinite one: "As Article 35 does not limit itself to functions laid down in some international instruments it is clear that it obliges the Contracting States to co-operate in *any and all of the functions* of the High Commissioner's Office, *irrespective of their legal basis*."[88] The unfettered potential of the obligation to cooperate with UNHCR may also be inferred from the following observation that was made by the delegate of Belgium when the 1951 Convention was drafted:

> The Belgium Government keenly desired the High Commissioner's collaboration in the execution of the Convention. In its opinion there was, in the present instance, no question of an international organization interfering in the exercise by Contracting States of their prerogatives, but only of a guarantee afforded to the refugees covered by the Convention. Although the need for such a guarantee might not often be felt, it was none the less true, as the Belgian delegation had already pointed out, that the authorities of the country of reception would be at the same time both judge and party in every appeal submitted by a refugee and in every request concerning the exercise of a right by a refugee. Article 30 [currently 35] gave refugees moral satisfaction in that it amounted to the setting up of the "refugees' government" to which they had long aspired.[89]

In short, Article 35 combines a specific obligation on the part of states parties to the Convention with an almost *carte blanche* for UNHCR. The conjunction of specificity and indeterminateness in Article 35, paragraph 1 can be considered to constitute a systemic feature that may ultimately account for some of the negative protection consequences to which Hathaway refers.[90]

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international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner."). The reference to a successor agency has become redundant, since the interval existence of UNHCR—its mandate required quinquennial prolongation—was in 2003 exchanged for an indefinite one, that is, "until the refugee problem is solved." *See* G.A. Res. 58/153, U.N. GAOR, 58th Sess., Supp. No. 49, at para. 9, U.N. Doc. A/Res/58/153 (2003).

[88] Grahl-Madsen, *supra* note 83, at 151 (emphasis added). Note that this may entail cooperation with regard to persons who fall within the mandate *ratione personae* of UNHCR, but outside the scope of the inclusion clause of the 1951 Convention.

[89] U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 27th mtg. at 11, U.N. Doc. A/CONF.2/SR.27 (1951).

[90] The reference is to the alleged (Convention-blind) deference of states to

Obviously, Article 35 entitles UNHCR to require the cooperation of states in the exercise of its functions, which explicitly includes the supervision of the application of the 1951 Convention. This supervisory task, which is jealously guarded by UNHCR,[91] is taken to include extensive exercises in interpretation, *i.e.*, interpretation that is "intended to provide legal interpretative guidance for governments."[92] A classic example of this long-standing—and generally accepted—practice is UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol, which was first issued in 1979 in response to a request to that effect of UNHCR's Executive Committee.[93] A more recent example is the set of guidelines UNHCR issued pertaining to the cessation of refugee status on the basis of Article 1C(5) and (6) of the 1951 Convention which complement the Handbook on Procedures and Criteria.[94] The legal justification for issuing those guidelines is stated by UNHCR to consist of its Statute/mandate in conjunction with Article 35 of the

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UNHCR's voluntary repatriation practice, which is identified as the cause of practices, such as their seizing a UNHCR-organized voluntary repatriation movement as sufficient imprimatur to either prematurely cease the refugee status of the refugees originating from the same state or to simply send them back. *Cf.* Hathaway, *supra* note 2, at 193, 198, 199, 202–03.

[91] For example, the first of the summary conclusions on supervisory responsibility drafted by UNHCR following the roundtable held in Cambridge in July 2001 as part of UNHCR's Global Consultations says, "Generally, there was agreement that the identification of appropriate mechanisms should seek to preserve, even strengthen, the preeminence and authority of the voice of the High Commissioner. Anything that could undermine UNHCR's current Article 35 supervisory authority should be avoided." *Summary Conclusions: Supervisory Responsibility Expert Roundtable, Cambridge, July 2001*, *in* REFUGEE PROTECTION, *supra* note 55, at 667–68.

[92] UNHCR, *Guidelines*, *supra* note 3, at 1.

[93] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, U.N. GAOR, 47th Sess., U.N. Doc. HCR/IP/4/Eng/Rev.1 (1992) (revising the 1979 version). In the Agenda for Protection, UNHCR is requested to produce complementary guidelines to this Handbook—guidelines that should draw on applicable international legal standards, state practice, jurisprudence, and doctrine (in particular also the inputs from the expert roundtables which were organized as part of the Global Consultations). *See* UNHCR, *Report of the Fifty-Third Session of the Executive Committee of the High Commissioner's Programme*, U.N. GAOR, 57th Sess., Annex IV, at point 6 of the programme of action, U.N. Doc. A/AC.96/973 (2002).

[94] UNHCR, *Guidelines*, *supra* note 3, at 1.

Convention and Article 2 of the 1967 Protocol.[95] In other words, UNHCR draws on the deference of states, which it considers to follow from the obligation of states to cooperate with it, particularly with respect to its Statutory task of supervising the 1951 Convention.

The "serious confusion between the standards which govern the work of the United Nations High Commissioner for Refugees—as an international agency—and those which circumscribe the sovereign authority of states parties to the Refugee Convention"[96] may consequently largely be explained by the nature of the obligation of states under the 1951 Convention and 1967 Protocol to cooperate with UNHCR, which comprises of facilitating its duty of supervising the application of the 1951 Convention. The allocation of tasks and responsibilities within the refugee law regime including the linkage between them that is provided by Article 35, paragraph 1 (and its equivalents) are in addition reflected (and confirmed) in a matching form of institutional overreaching for which states themselves are responsible as will be set out in section III.D.

C. *Limits To Article 35: Checks And Balances*

Article 35, paragraph 1 calls for cooperation with UNHCR in the exercise of its functions, which includes supervision of the application of the 1951 Convention. The question that follows naturally considering the blanket nature of Article 35, paragraph 1 pertains to the limits to the obligation of states to cooperate with UNHCR on the basis of this provision.

With respect to supervision, the agency has long considered its supervisory role as including interpretation of the Convention.[97] It could be argued that supervision includes guaranteeing that the Convention is applied in a substantially similar manner in comparable situations. In order to do so, a yardstick is obviously necessary. This yardstick naturally consists of the

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[95] Article 2, paragraph 1 of the 1967 Protocol states as follows:

> The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.

1967 Protocol, *supra* note 6, at art. 2, para. 1. This section and the next section will focus on Article 35, paragraph 1, but the findings apply *mutatis mutandis* to Article 2, paragraph 1.

[96] Hathaway, *supra* note 2, at 215.

[97] *See supra* Part III.B.

text of the 1951 Convention itself. However, the text may not always be sufficiently clear. Moreover, since it dates from 1951, it may need to be adapted to modern needs, convictions, and legal developments.[98] The need for such a yardstick immediately demonstrates the awkwardness of UNHCR's supervisory task. UNHCR is fully entitled to identify what it considers to be the yardstick it will apply in its exercise of the Statutory task of supervision, yet interpretation of the 1951 Convention beyond the accepted canons of interpretation—a rather elastic one can be found in two Vienna Conventions pertaining to the law of treaties[99]—may well be considered to fall outside the supervisory function of UNHCR and squarely within the power of states parties to the 1951 Convention, hence exceeding the scope of the obligation to cooperate with the agency on the basis of Article 35. There is no easy solution to the balancing act required here. The fact that UNHCR touches on, if not infringes, the prerogative of states parties to interpret the obligations they have incurred under the 1951 Convention may well explain, though, why states do not consider themselves legally bound to observe the

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[98] This contention would not seem to be too far-fetched; reference could be made to the practice (and in particular the need which induced it) of issuing general comments by the Human Rights Committee and the Committee on Economic, Social, and Cultural Rights with respect to the provisions of the 1966 Covenant on Civil and Political Rights and the 1966 Covenant on Economic, Social, and Cultural Rights, respectively. Whereas the former instrument contains a provision (Article 40, paragraph 4) that allows such general comments, the latter does not. On the legal basis and practice of the Human Rights Committee to issue general comments, see HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 731–32 (2d ed. 2000). In that respect, it is worth adding that states are requested to provide UNHCR with information about the implementation of the 1951 Convention and 1967 Protocol on the basis of questionnaires; UNHCR and states were requested by the Executive Committee to work together to strengthen implementation including through harmonized application of the refugee definition criteria. UNHCR Executive Committee Conclusion No. 68 (XLIII), *General Conclusion on International Protection*, U.N. GAOR, 47th Sess. (1992). *But see* Walter Kälin, Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond, 2001, at para. 18 (background paper for the second expert roundtable in Cambridge as part of UNHCR's Global Consultations) (describing the somewhat disappointing practice of this information gathering), para. 7 (describing the primary purpose of Article 35, paragraph 1 of the 1951 Convention (and Article 2 of the 1967 Protocol) of achieving "an optimal implementation and harmonized application of all the provisions of the Convention and its Protocol").

[99] The Vienna Convention on the Law of Treaties, May 23, 1969, at arts. 31–32, 1115 U.N.T.S. 331, 340; The Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations, Mar. 21, 1986, U.N. Doc. A/CONF.129/15 (1986).

procedures and criteria set out by UNHCR in its handbook.[100]

Beyond the specific task of supervising the application of the 1951 Convention, UNHCR may call and expect the cooperation of states with respect to the exercise of its own functions, including in particular those identified earlier as distinct ones, *e.g.*, its active search for durable solutions including the norms that it, true to its mandate, develops in order to be able to implement those solutions.[101] This cooperation on which UNHCR may rely is subject to two forms of limitation. First of all, it should be recalled that UNHCR's overall tasks were meant to be complementary to those of states. In that respect, the agency has a subsidiary, rather than a primary, role to play. However, when it comes to such distinct tasks which demand a more extensive (and primary) role on the part of UNHCR, such as with respect to voluntary repatriation, a second limitation should be emphasized—the obligations of states under the 1951 Convention.[102] Any overreaching in this respect may be checked by entering the various obligations states have under the 1951 Convention, of which Article 35, paragraph 1 is but one, into the equation. Put differently, the juxtaposition of the obligation to cooperate with UNHCR to the various other obligations comprised in the 1951 Convention needs to be emphasized. Nonetheless, UNHCR cannot be reproached for state practice in violation of treaty obligations; neither the fact that states seize a UNHCR-organized voluntary repatriation movement to engage in the return of refugees originating from the same state nor do so to cease the refugee status of those refugees can be attributed to UNHCR either directly or indirectly.[103]

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[100] *See* Kälin, *supra* note 98, at 9–10 (concluding that such UNHCR positions on matters of law are authoritative, but not legally binding).

[101] Any such norms are, however, developed in close cooperation with states and scholars. *See, e.g.*, UNHCR, *Information Note on the Development of UNHCR's Guidelines on the Protection Aspects of Voluntary Repatriation*, U.N. GAOR, 48th Sess., U.N. Doc. EC/SCP/80 (1993).

[102] This point is repeatedly made by Hathaway. *See, e.g.*, Hathaway, *supra* note 2, at 202 (referencing the fact that, "It is states parties which are held to account under the Refugee Convention, and their accountability is strictly a function of compliance with their formal treaty obligations").

[103] Hathaway implies this throughout. *See, e.g.*, Hathaway, *supra* note 2, at 193, 198, 199, 202–03, 206, 215 (contending indirectly that UNHCR has facilitated ducking the stringent obligations of the 1951 Convention by failing to articulate the difference between its institutional role in voluntary repatriation and the possibility of mandatory repatriation following the application of the fifth and sixth cessation clauses).

D. *The Contribution of States*

UNHCR is criticized for acts and omissions which are ultimately considered to cause a conflation of norms, affecting what is referred to as the authentic scope of the 1951 Convention by sidelining obligations comprised in the 1951 Convention. The mandate of UNHCR, as laid down in its Statute, in conjunction with Article 35, paragraph 1 of the 1951 Convention goes a long way towards explaining the legal confusion that has been identified by Hathaway, exculpating UNHCR along the way.

In addition to this systemic cause, it would seem that states themselves have contributed to this confusion by drawing on the systemic features of the refugee law regime and proceeding from the institutional prominence UNHCR enjoys within that regime on the basis of its Statute and Article 35, paragraph 1.

For instance, it would seem that states, rather than UNHCR, are responsible for the prominence that has been given to the solution of voluntary repatriation. This prominence is not, however, surprising—the refugee law regime only knows two solutions: voluntary repatriation and reintegration (which may take place in the country of asylum or elsewhere upon resettlement). Resettlement of refugees is, to put it mildly, problematic: in that respect, the last major resettlement, that of Indo-Chinese refugees, proved only possible when the countries of refuge engaged in what cannot be qualified other than in terms of blackmail.[104] In practice, the sparsely available resettlement places are used for the most destitute cases for which no other option is available.[105] It is consequently only pursued as a last resort. Integration in the country of refuge will take place more often but, again, is not an option in those instances where a state hosts a substantial refugee population. In short, reality dictates the preference for the solution of voluntary repatriation. States have expressed this preference time and again, both in the General Assembly, the parent organ of UNHCR, and the Executive Committee, a subsidiary organ of the Economic and Social

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[104] *See, e.g.*, Arthur C. Helton, *Asylum and Refugee Protection in Thailand*, 1 INT'L J. REFUGEE L. 20, 24–25 (1989); *see also* MARJOLEINE Y.A. ZIECK, UNHCR AND VOLUNTARY REPATRIATION OF REFUGEES: A LEGAL ANALYSIS 226, 463 (1997).

[105] In 2003, 26,000 refugees were resettled. Only 16 states have agreed to annual resettlement quota. Note that the resettlement figure for 2003 differs in this report. *See Meeting on Refugee Resettlement Opens in Geneva*, UNHCR News Stories, June 15, 2004, *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/news; *see also* UNHCR Standing Committee, *Progress Report on Resettlement*, U.N. ESCOR, 30th mtg. at para. 32, U.N. Doc. EC/54/SC/CRP.10 (2004).

Council (ECOSOC), the other principal United Nations organ charged with supervising UNHCR.[106]

The Statute of UNHCR foresees the establishment by the ECOSOC of an advisory committee.[107] The initial reason the Statute envisaged the creation of such a committee was to secure the cooperation of states which are not members of the United Nations.[108] This rationale for its existence has lapsed by now, in view of the fact that most states are members of the organization. It may explain, though, why this body has always been composed of states rather than independent experts. The remaining reason for this composition consists of the consideration that interested states, often the states directly affected by refugee crises, should be represented on this body.[109] This composition probably induced Hathaway's observation that the Executive Committee "symbolically reaffirms the commitment of states to refugee law and provides democratic legitimacy" to the work of UNHCR.[110]

The function of the body now known as the Executive Committee of the Programme of the United Nations High Commissioner for Refugees[111] was

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[106] *See* Statute of UNHCR, *supra* note 6, at art. 1 (stating that the High Commissioner is "acting under the authority of the General Assembly"), art. 3 ("The High Commissioner shall follow policy directives given him by the General Assembly or the Economic and Social Council."), art. 11 ("The High Commissioner shall report annually to the General Assembly through the Economic and Social Council.").

[107] *Id.* at art. 4.

[108] *Cf.* G.A. Res. 319 (V), at 36, U.N. Doc. A/Res/319 A(IV) (1949); *see also* U.N. GAOR 3d Comm., 5th Sess., 335th mtg., at para. 19, U.N. Doc. A/C.3/SR.335 (1950) (USA). A very different consideration was formulated by the delegate of France: "The advisory council would have a wholesome effect in that it would prevent the High Commissioner from becoming a virtual dictator over the refugees between sessions [of the General Assembly and the ECOSOC]." U.N. GAOR 3d Comm., 5th Sess., 334th mtg., at para. 32, U.N. Doc. A/C.3/SR.334 (1950).

[109] *See* Statute of UNHCR, *supra* note 6, at art. 4; E.S.C. Res. 672, U.N. ESCOR, 25th Sess., Supp. No. 1, at 5, U.N. Doc. E/Res/672 (1958). In addition, this composition ensures a structural form of liaison with the donor states among them; note in that respect the functions and authority of the Executive Committee with respect to the allocation and use of funds by UNHCR. *Id.* at art. 2.

[110] James C. Hathaway, *Who Should Watch over Refugee Law?*, FORCED MIGRATION REV., July 2002, at 23–24.

[111] The current Executive Committee was established in 1958; it succeeded the UNREF (United Nations Refugee Fund Executive Committee) (1955–1958), which had, in turn, succeeded the UNHCR Advisory Committee on Refugees (1951–1955). *See* E.S.C. Res. 672, *supra* note 109, at 5 (establishing the Executive Committee); E.S.C.

to act, at the request of the High Commissioner, as an advisory body to UNHCR with respect to the exercise of its functions.[112] Although its advice was not binding to the High Commissioner, the General Assembly has changed the status of that advice into UNHCR-binding directives. However, the Executive Committee does not confine itself to giving advice to UNHCR but also addresses states.[113] Regardless of the legal status of its addresses and calls on states,[114] these should not be ignored in view of their function within the refugee law regime. However, unlike UNHCR's standard-setting with respect to its functions and securing the cooperation of states thereby which is firmly rooted in law, the practice of the Executive Committee to address itself to states in its conclusions does not find a basis in law.

The conclusions of the Executive Committee have greatly contributed to the institutional prominence of UNHCR. By way of illustration, reference can be made to the conclusions it adopted regarding the solution of voluntary repatriation: UNHCR was given the right of initiative and full involvement not only with respect to the logistics of voluntary repatriation but also with respect to its substance by allowing UNHCR to become a party to voluntary repatriation agreements by giving the agency the responsibility of creating the conditions conducive to return, an extended mandate, and so forth.[115]

Res. 565, U.N. ESCOR, 19th Sess., Supp. No. 1, at 2–3, U.N. Doc. E/Res/565 (1955) (establishing the UNREF Executive Committee); E.S.C. Res.. 393, U.N. ESCOR, 13th Sess., Supp. No. 1, at 49–50, U.N. Doc. E/Res/393 (1951) (establishing the Advisory Committee on Refugees).

[112] For the terms of reference, see G.A. Res. 1166, U.N. GAOR, 12th Sess., Supp. No. 18, at 19, U.N Doc. A/Res/1166 (1957) and E.S.C. Res. 672, *supra* note 109.

[113] In addition, the Executive Committee urged states to heed its conclusions; this "[s]tresses the importance of the role played by this Committee in providing guidance and forging consensus on vital protection policies and practices, and, in this connection, emphasizes the need for due regard to be paid to the Conclusions of the Executive Committee." UNHCR, Executive Committee Conclusion No. 81, *supra* note 29, at (g).

[114] *See* Jerzy Sztucki, *The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme*, 1 INT'L J. OF REFUGEE L. 285, 303 (1989).

[115] *See* UNHCR, Executive Committee Conclusion No. 18, *supra* note 84; UNHCR, Executive Committee Conclusion No. 40, *supra* note 84; UNHCR, Executive Committee Conclusion No. 74, *supra* note 66, at (y) (reaffirming both Conclusion No. 18 and Conclusion No. 40) (stating that this "underscores the leading role of UNHCR in promoting, facilitating, and coordinating voluntary repatriation of refugees, in cooperation with States concerned, including ensuring that international protection continues to be extended to those in need until such time as they can return in safety and dignity to their country of origin, assisting, where needed, the return and reintegration of

Another example that relates to UNHCR's task of supervising the application of the 1951 Convention is the conclusion the Executive Committee adopted with respect to cessation of protection.[116] In this conclusion, the Committee suggests that a decision on cessation on the part of UNHCR may be useful to states in connection with the application of the cessation clauses in the 1951 Convention.[117] In addition, the Committee indicates, with explicit reference to the supervisory task of UNHCR laid down in Article 35, paragraph 1, that UNHCR should be appropriately involved in the application of the cessation clauses, which nevertheless exclusively rests with the contracting states themselves.

Even a cursory glance at the many conclusions the Executive Committee has adopted throughout the years indicates that the Committee draws on the original allocation of responsibilities within the refugee law regime, including the obligation of states to cooperate with UNHCR. At the same time, though, it cannot be maintained that the Executive Committee loses sight of the obligations and corresponding responsibilities of states parties to the 1951 Convention and 1967 Protocol. Having said this, the serious negative protection consequences identified by Hathaway, such as the recurrent practice of states seizing a UNHCR-organized voluntary repatriation movement as a trigger to either cease refugee status or return refugees originating from the same country of origin, call for more specificity on the part of the Executive Committee. With respect to voluntary repatriation, for instance, much confusion would be eliminated if the distinction between the criteria that govern voluntary repatriation and those which justify cessation of refugee status would be elaborated in a conclusion, and the same holds true for the composite "safety and dignity."[118] More specificity on the part of the Executive Committee could

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repatriating refugees and monitoring their safety and well-being upon return").

[116] UNHCR, Executive Committee Conclusion No. 69, *supra* note 29.

[117] The stated utility may be explained by the fact that the nature of the refugee law regime entails that refugees are not only the concern of a particular host state, but simultaneously of UNHCR. This, in turn, favors simultaneous action with regard to cessation, considering the problems that may ensue when the host state invokes these clauses before UNHCR is prepared to do so with respect to a particular group of refugees. In view of this, the decision of the government of Zambia to defer repatriation of Rwandan refugees "until the United Nations signs a cessation clause to strip them of their status" should be welcomed. The Times of Zambia, *Zambia: 'Rwandan Refugees Can't Be Forced Out'—Government*, AFRICA NEWS, Mar. 4, 2003, *available at* LEXIS, News Library, Allnws FILE.

[118] *See* Zieck, *supra* note 31, at paras. 3.1, 3.3.

also serve to clarify the relation between UNHCR's supervisory role with respect to the 1951 Convention and the responsibility of states to implement this Convention.[119]

[119] The following issue, which was raised by Professor Fitzpatrick, is illustrative of the specificity that would be required: "Executive Conclusion No. 69 (XLIII) and the Guidelines [on the application of the cessation clauses dating from 1999] allude to UNHCR's supervisory role under Article 35 of the 1951 Convention in discussing evaluation of changed conditions, but they do not clearly state what is to happen when the asylum state's assessment diverges from UNHCR's." Fitzpatrick, *supra* note 25, at para. 48; *see also supra* note 117.